

From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court

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The story of an institution in decline

The Polish Constitutional Court, once a proud institution and an effective check on the will of the majority, is now a shell of its former self. The constitutional scars of the capture affect not only the legitimacy of the institution, but also the very constitutionality of the “decisions” rendered by the new court in 2017-2018. [The scars of the capture](#) had transformed the constitutional identity of the Court in three crucial registers: i) *unconstitutional composition*, both at the level of the judges and the President and Vice President; ii) growing participation of “irregular judges” in the cases heard by the Court in 2018 and the *ex post facto* validation by the very judges of their own unconstitutional appointment to the Court; iii) the day-to-day functioning is determined by the statutory scheme of intricate legislative provisions adopted by the majority in 2016 – 2017. As a result the Court has been turned from an institution that checks political power into a government-enabler. The Court no longer checks the political power. Rather, it legitimates and shields it against the unwanted challenges from the opposition.

In 2018 this sad state of affairs not only continued, but further aggravated the health of liberal democracy in Poland. 2018 also added new plots, themes and manifestations. 2018 in Poland has not just been about cases decided. It has been as much about the dangerous processes launched and the abuse of judicial review (for a more detailed analysis T. T. Koncewicz, A. Podolska, *Constitutional Developments. Poland*, in the forthcoming *2018 Global Review of Constitutional Law*; for 2017 *Global Review* click [here](#)). Most importantly, the developments in 2018 invite us to step aside for a moment and ask a more general question: how does the capture of the Polish Constitutional Court affect the tenets of liberal constitutionalism beyond Poland?

The combined effect of the changes introduced in 2015-2016, the management of the Court's workload by the (irregular) President of the Court, Judge Julia Przytycka, and the continued adjudication by „irregular judges” marginalized the significance of the Court's jurisprudence in the Polish legal order. The overall institutional efficiency of the Court [took a hit](#). The Court is lacking staff, the proceedings last longer and there is a problem with the execution of the judgments. The number of cases filed with the Court, as well as those decided by the Court, decreased significantly. Before the constitutional crisis, the Court accepted about 500-600 cases annually. In 2016, this number decreased to 360 cases, and in 2017 it was down to 282 cases. The Court, once known for its efficiency (in 2014 alone,

the Court rendered 119 judgments and in 2015 – 173), has become [a slow-motion institution](#): In 2016 and 2017 the Court issued 99 and 89 judgments, respectively. In 2018 the number of judgments has dropped to an all-time low of 65 decisions (36 judgments and 29 orders). This is a picture of an institution [in decline](#) (for the statistics I am very grateful to, and acknowledge, Dr Anna Podolska for her outstanding research assistance). The practice of configuring adjudicating panels raises serious [concerns as well](#). In the bench consisted of unconstitutionally elected judges in 18 out of 36 cases. In 2018, this happened in 28 out of 65 cases. The question regarding the legality of the election of constitutional judges was raised in a few cases and was addressed by way of dissenting opinions. Every time Judge Sławomira Wronkowska-Jaskiewicz sat on the bench with the judge appointed without legal basis, she [signed](#) a separate opinion in which she pointed out the procedural irregularity of the decision as a result of the defective composition of the court. In turn, unconstitutional judge and unconstitutional Vice-President of the Court Mariusz Muszyński [retorted](#) by alleging that Judge Wronkowska-Jaskiewicz herself was sworn in an unconstitutional manner. First, he argued that her selection was contrary to the Rules of Procedure of the *Sejm*. Secondly, he questioned the validity of her oath given before the Speaker of the *Sejm*, who at that time performed presidential duties. It is to be noted here that the Speaker of the *Sejm* performed these duties in accordance with the Constitution after the presidential plane crash in Smoleńsk that claimed the life of then President L. Kaczyński.

The certainty of the result

In addition, the composition of the judicial panels has been anything but predictable. In January and February 2017, the President of the Court changed the compositions of the panels in an unprecedented number of 49 cases (53 orders). To make things even worse, the President acted *contra legem*: In all these 49 cases there was no statutory legal basis for making changes to the adjudicating panel. In 21 cases, decisions were made without providing any grounds. In [one case](#), one of the irregular judges indicated that it is possible to change the composition of the panels by, for example, “changing the rapporteur for the case as a result of the lack of acceptance of the composition of the presented draft judgment”. The effect of all this is that the Court is being steered from within so as to minimise the uncertainty of an outcome and to deliver on the expectations of the powers that be. Clearly the judges rushed on the bench by the ruling party receive preferential treatment. In 2018, the judges (both regular and irregular) elected by the current Parliament were presiding over and acted as rapporteurs in 41 cases.

Constitutional warfare

The significant development of 2018 to be noted here has been an escalating warfare between one of the irregular judges – Mariusz Muszyński – and the Polish Ombudsman. The Ombudsman kept pointing out that changes to the adjudicating panels lack a legal basis. He was persistent in lodging applications for the irregular judges to be excluded from the panels. In 2017, twenty applications were filed for the exclusion of judges. The majority of the applications concerned irregular

judges. None of the applications was granted. In three of such cases, the members of the panels themselves were unconstitutionally sworn. Case [K 9/16](#) is only one example. In this case, the application by the Ombudsman was rejected and as a result later withdrawn. In the Ombudsman's opinion, a judgment made by irregular judges would be illegal and affect all judicial decisions made later in the course of the proceedings. That would in turn deepen legal chaos in Poland. With no pending and valid application, the Court was no longer seized of the case and as a result decided to discontinue the proceedings. In this case, M. Muszyński submitted a scathing dissenting opinion. Muszyński considered the Ombudsman's decision to be unfavourable and incomprehensible to the public. According to Muszyński, The Ombudsman's requests to exclude persons from the panel were a manifestation of "judicial barratry" which disturb the functioning of the Court and have nothing to do with the Ombudsman's systemic role to protect constitutional rights and freedoms. His dissent is a thinly veiled incitement addressed at *Sejm* to capture the recalcitrant office still roaming free in an otherwise captured state.

Start with the *boats*, but focus on the *journey*

The picture painted here is one of a compromised institution that lost the ethos of independent and impartial constitutional adjudication. What [N. Walker](#) called the second lock of the control of the political system – the independence of the constitutional court – has been irreparably broken. Cases are decided *in camera*. The assignment of cases to individual judges is opaque and depends on the whim and caprice of the unconstitutionally elected President who tailors the composition of the bench to the political importance of cases. The more important the case from the perspective of the political majority, the more likely will it be heard exclusively by judges that were elected by the new Parliament. The Court decides less and less cases, as the cloud of unconstitutionality hangs over its decisions. The transparency of the proceedings is reduced to zero. Most important decisions are taken by the one-man team of Judge Przyłębska who, along with irregular judge Muszyński, has become the most trusted guardian of the new unconstitutional order. Granted, these are all momentous developments, and yet, to stop here would be like focusing on the boats, while missing out on the journey.

In the life of the Polish Constitutional Court, 2018 corroborates that there is more to the destruction of judicial review as the new authoritarians engage to an increasing extent with constitutionalism and constitutional reform. Constitutional talk is used and abused in order to cloak an illiberal agenda with the veneer of constitutionalism. A new constitutional doctrine of the politics of resentment still on the rise in 2017, has become entrenched in Poland A.D. 2018. A core concept of the politics of resentment and populism is constitutional capture. Constitutional capture is a generic and novel concept. It connotes a systemic weakening of checks and balances and the entrenchment of power by making future changes in mechanisms of control difficult. Constitutional capture has an inherent spill-over effect, and as such the seemingly isolated constitutional capture in Poland and elsewhere risks the potential of adverse consequences throughout the entire continent (see T. T. Konciewicz, *The Politics of Resentment and First Principles in the European Court of Justice*, in F. Binghami, (ed.), *The EU in populist times*, OUP, forthcoming). It travels in

time and space, and, just like, the politics of resentment, it has its own trajectory. As there is simply no place for a veto emanating other than from the majoritarian parliaments, the “politics of resentment” target institutions that otherwise might be seen as a brake on the power of the people’s representatives. Institutions are only accepted as long as they are seen as “their” institutions and only translate messages that the controlling parties believe to deserve to be in the public sphere. Such an understanding leads to an important tweak to the established narrative: institutions that have been channelling (for populists “distorting”) the rule of law must be dealt with as expeditiously as possible. With the extreme majoritarianism as one of the cornerstones of the new doctrine, disabling constitutional courts and judicial review is the first order of the day for constitutional capture. All institutions, domestic or supranational, stand in the way and are not part of the new populist constitutionalism. Gaining power thus does not soften populist animus. Quite the contrary, once elected, populist leaders are ready to deliver on their promises and they do so through a constitutional doctrine that competes with the dominant liberal constitutionalism. This new emerging doctrine includes the following, often interrelated, elements: (i) a new understanding of the role of the constitution, no longer as protecting against the state, but as safeguarding the uniqueness of the state; (ii) the constitution ceases to be the supreme law of the land; (iii) the constitutional court is not only incapacitated but also “weaponized” to be used as a tool against political enemies; (iv) the political dominates the legal; (v) the rule of law is seen as an obstacle to protecting the collectivity; (vi) the rule of law is to facilitate the expression of the will of the people; (vii) political power is no longer subject to checks and balances; (viii) supranational institutions are dismissed as enemies of the people; (ix) the collectivity is placed above individual citizens; (x) human rights evolve from the dignitary conception to that of the community.

Think Political Justice, See the Polish Constitutional Court A.D. 2019

2018 in the life of the Polish Constitutional Court evokes the dark legacies of what [O. Kirchheimer](#) famously called political justice. The aim of political justice is to enlarge the area of political action by enlisting the services of courts on behalf of political goals. Yet this is only half the truth. Courts apply laws, so without carefully crafted legislative schemes, the courts would be like craftsmen without tools. Law must be adapted so as to enable the judges met out the political justice. The correct law both circumscribes and empowers the judges in their mission. On the other hand, the law that traces its roots to, and espouses ideologies of, the old regime, cannot be trusted. As the political always prevails over the legal, law must reflect the political at all times, not the other way around. The resort to court, as Kirchheimer argued, thus becomes a mere technical device for disposing of a vanquished rebel. It may signify a more or less concerted effort to rid the community of its stock of political foes, or it may be directed toward creating effective political images.

So understood, political justice is the domain of populist constitutionalism and chimes in well with the avowed objective of constitutional capture: Taking over the institutions and making them “our institutions”. Political justice is intuitive and plays

on emotions and fleeting grievances along the lines of “we the righteous” will now go after the corrupt and rotten elites that have been oppressing the silent majority. The normal course of proceedings and following the rules are ridiculed as a ritual devoid of any meaning, one that strips the popular sense of justice, of its essence. People neither understand nor care. What matters is the visual: guilty must be found, and punished, and it must be in the public eye, with all the pomp and circumstances. Contact between the political power and the people must be direct, immediate and instantaneous. Planned justice, understood as following the rules, is tainted by its uncertainty and slowness, both of which are held in low esteem by the politics of resentment as mere legal technicalities that deceive the public and serve the wealthy.

Polish lessons: How do courts matter to authoritarian regimes?

In the trajectory of constitutional developments in Poland, this past year has been about much more than just cases that were decided. It has been first and foremost about the snowballing abuse of judicial review and connecting the dots of the capture. The Court has accepted its new role to act as an extension of the will of Parliament. The only rationale for its existence is to minimise the uncertainty and deliver decisions that are swift and predictable from the perspective of the political majority. The Court, in tandem with the Ministry of Justice and zealous and pliant members of the Parliament, has become the chief architect of the effective political images. The most ominous constitutional lesson from Poland in 2018 is that judicial institutions do indeed become increasingly relevant to political life in [authoritarian polities](#). The Polish Constitutional Court is the prime example of how courts matter to authoritarian regimes. The ruling party does not need an independent Court because it clearly does not contemplate becoming a minority any time soon. And yet, the Court is not just a facade institution but plays a crucial role in the overall scheme of the captured state. It is its most important guarantor. This latter lesson is important as it debunks the widely held view that populist authoritarians are *ex definitione* against the institutions of the state. Quite the contrary. As the trajectory of the Polish Constitutional Court shows, they need institutions, but such that are subservient, compromised and deliver political justice.

The Court, or what is left of it, is now gripped by and fully at the service of political justice and the politics of resentment. It is the chief guardian of the entrenchment of political power. And 2019 is already shaping to become a continuation of these dark dynamics and processes.

When all is said and done, though, one thing is beyond doubt. In order to [restore the rule of law](#), Poland will need a new constitutional court built from scratch. Once (hopefully) better constitutional days come, it must be the first order of the new constitutional design for Poland. And this is the most important constitutional takeaway from 2018 and a signpost for the future.

